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No. 934

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

ANN C. FIELD, et al., *Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY FOR PETITIONERS

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REPLY FOR PETITIONERS

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled cases.

ARGUMENT IN REPLY

I

1. Respondent's Brief in Opposition contains a misleading statement of material fact which has a significant bearing on the final result in these cases.

All the taxes asserted against Adwood (and with respect to which waiver of restrictions on assessment were given) were not assessed on October 23, 1953 or at any time thereafter (Respondent's Brief, p. 4; Petition pgs. 4 and 22). It is because of this circumstance the petitioners as transferees are not liable for interest on the unassessed taxes,

which interest has nevertheless been collected from them under the Tax Court's decisions entered July 25, 1959 (Petition pages 22-23).

Petitioners have sought to correct the said decisions of the Tax Court, but the Tax Court and the Sixth Circuit have denied them their right to be heard. This is a denial of justice which this Court can and should remedy. *Hormel* v. *Helvering*, 312 U.S. 552 (1941); *Helvering* v. *Richter*, 312 U.S. 561 (1941).

2. Respondent would ignore state law, and the rule of this Court in *Commissioner* v. *Stern*, 357 U.S. 39 (1958), in determining whether notices of deficiency were timely issued to petitioners as transferees, arguing that the date of termination of Adwood under state law and the question of whether or not a "proceeding" was commenced under state law are irrelevant. Respondent argues (Respondent's Brief p. 8) that Section 311(c) of the 1939 Code authorizes ignoring the termination of Adwood's corporate existence in determining the period of limitations.

Respondent's argument with respect to the applicability of Section 311(c) ignores the history, intent, and the clear purport of its language to provide against only the lapse of the three-year original period for assessment by reason of corporate dissolution. Any extension of life for assessment beyond this period for federal purposes depends on state law rules and is not covered by the specific federal statute.

Respondent in the courts below has clearly recognized this limited purpose of Section 311(c) but would now ignore his own previously advanced position.

3. The short answer to respondent's contention (Respondent's Brief, p. 8) that the United States is not bound by state statutes of limitations is that the Michigan statute

pertinent in these cases is not a statute of limitation but primarily a declaration of the time limit on corporate existence, and under the rule of the *Stern* case must be looked to to determine the date on which the transferor's existence terminated and thus the date by which timely notices of deficiency must have been sent to the transferees.

4. In the event of failure of its argument on the basis of Section 311(c), the respondent would, as has previously been pointed out by petitioners in their petition for writ of certiorari, treat the 30-day letter as the commencement of a "proceeding" against Adwood within the meaning of the Michigan statute.

Respondent refuses to recognize the direct conflict which exists between the decision of the Sixth Circuit in these cases and the decisions of the Second and Fourth Circuits in *American Standard Watch Co., Inc.* v. *Commissioner*, 229 F. 2d 672 (2d Cir. 1955), and *Bahen and Wright, Inc.* v. *Commissioner*, 176 F. 2d 535 (4th Cir. 1949), and in fact argues that the latter cases support the decision of the Sixth Circuit. Petitioners have previously pointed out the specific facts which clearly demonstrate the conflict. It is important now only to set right respondent's seriously misleading quotation from *Bahen and Wright* (Respondent's Brief p. 10) by quoting in full the statement of the Fourth Circuit which clearly supports petitioner's contention:

> "The issuance of the Commissioner's notice of deficiency under Section 272 of the Internal Revenue Code is the first formal step in the assessment and collection of an additional tax without which payments of the tax cannot be enforced. It suspends the collection of the tax for ninety days and is a necessary preliminary to the petition for review which the taxpayer may file with the Tax Court within that period. If the petition is filed, the Tax Court acquires a jurisdiction and the

collection of the tax remains in abeyance until the court has affirmed, modified or rejected the Commissioner's determination. We think that these several steps may fairly be regarded as parts of an integral administrative proceeding, and that it cannot be said that the proceeding does not begin until the jurisdiction of the Tax Court is invoked. The court merely takes the final administrative step as "an independent agency in the Executive Branch of the Government." Internal Revenue Code §1100; *Goldsmith* v. *United States*, 270 U.S. 117 [1 USTC ¶ 164]; *Lincoln Electric Co.* v. *Commissioner*, 6 Fed. 379 [47-1 USTC ¶ 9282]. But cf. *Anderson* v. *Commissioner*, 7 Cir., 164 Fed. (2d) 874 [48-1 USTC ¶ 9109]. Hence the proceeding in the pending case was begun within three years of the taxpayer's dissolution."

The integral administrative proceeding referred to is that which begins with issuance of the 90-day letter and includes petition to the Tax Court. The decision of the Fourth Circuit is clearly that only the 90-day letter—the only technique provided for by statute to commence a proceeding—is a sufficiently formal step to constitute the commencement of a "proceeding" as the term is used in the statute construed.

5. Respondent's attempt (in footnote 5 on p. 11 of Respondent's Brief) to rely on the administrative procedures which have been outlined for the issuance of the 30-day letter ignores the vital fact that the 30-day letter is not a final determination but merely a proposal, and that only in the event no response is made to that proposal is the 90-day letter automatically issued; in the event response is made the 90-day letter may never be issued. More important still, the administrative procedure for the assessment and collection of taxes is not the statutory procedure which must be followed to commence a proceeding; this procedure is the issuance of a 90-day letter.

6. Further, in its footnote respondent would have us believe because a 90-day letter *might have been issued* in these cases had Adwood not acceded to the 30-day letter proposal, that the 30-day letter should be considered the event which commenced a proceeding. Quite to the contrary, after issuance of the 30-day letter, having acceded at the administrative level to the assessment of the proposed taxes without the issuance of a 90-day letter, if there was a proceeding earlier commenced (which constituted an administrative proceeding) it was terminated upon the act of assessment.

7. The respondent contends the Tax Court does not have jurisdiction over interest (although these are transferee proceedings cf. Section 311(a) I.R.C. 1939) *and yet the Tax Court decisions appealed from specifically include the interest* which is here attacked.

The last sentence of the Brief in Opposition reads:

> "The fact that the Tax Court fixes the date from which any interest is to be computed does not mean that it has undertaken to determine the amount of interest to be paid."

Petitioners submit that this Court should not subscribe to such sophistry.

Respondent's indicating that the Tax Court's fixing of the date from which interest is to be computed is not the same as calculating interest merely begs the basic question which must be resolved; that is, whether the date which was fixed by the Tax Court was the proper date for computing interest. The mathematical computations, of course, need not be made by the Tax Court and can be made by anybody, but the fixing of the legal date from which in-

terest should properly be computed is by respondent's own admission in its brief properly within the scope of Tax Court jurisdiction, and challenge to determination of that date was timely raised and should be considered in this proceeding and not left to separate suit for refund in a federal district court, prolonging and adding to already extended litigation.

8. A study of the record shows that the first motions for reconsideration were timely filed and that in filing the second group of motions with respect to the interest computations the petitioners have proceeded with due diligence.

9. The significant support to petitioners' position found in the recent decision of the Tax Court in *Wheeler's Peachtree Pharmacy, Inc.*, 35 T.C. No. 22 (1960) and outlined in petitioners' original Petition is underlined by the recent acquiescence of the Commissioner in that decision in Internal Revenue Bulletin No. 1961-17, April 24, 1961.

CONCLUSION

For the reasons urged in the petition for writ of certiorari, such writ should be granted.

Respectfully submitted,

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